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Proposed Mercury Rules Bear Industry Mark

EPA Language Similar to That in Memos From Law Firm Representing Utilities

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The Bush administration proposed new rules yesterday regulating power plants' mercury pollution, and some of the language is similar to recommendations from two memos sent to federal officials by a law firm representing the utility industry.

The three approaches that the administration published for public comment would for the first time regulate airborne emissions of toxic mercury, which can enter the food chain and cause developmental damage to infants whose mothers eat mercury-tainted fish.

A side-by-side comparison of one of the three proposed rules and the memorandums prepared by Latham & Watkins -- one of Washington's premier corporate environmental law firms -- shows that at least a dozen paragraphs were lifted, sometimes verbatim, from the industry suggestions.

Environmental Protection Agency officials dismissed the matter as largely an interagency mix-up that had little to do with shaping the administration's centerpiece proposal for forcing power plants to reduce mercury emissions 70 percent by 2018. They said the law firm language that turned up in the proposed rule published in the Federal Register was related to an alternative proposal that the administration does not support.

"That's not typically the way we do things, borrowing language from other people," said Jeffrey Holmstead, head of the EPA's air policy office. "But it came to us through the interagency process."

Latham & Watkins was among the law firms and utility industry groups that lobbied the administration last year during deliberations over mercury rules in the Clean Air Act. The firm represents Cinergy Inc. and other major utilities and energy companies with a major interest in the outcome of the rule-making. Holmstead, an assistant EPA administrator, and his chief counsel, Bill Wehrum, worked for Latham & Watkins before joining the EPA.

There is nothing unusual about industry groups peppering government agencies with position papers and recommendations. Indeed, lawyers for Latham & Watkins served on an EPA mercury advisory group and submitted two detailed memos -- one dated March 8, 2002, that dealt with the challenges of regulating different grades of coal, and another, dated Sept. 4, that outlined a number of regulatory legal theories. However, some former EPA officials said it is rare for the agency to simply insert large chunks of an industry analysis into a proposed rule.

"The regulations are supposed to be drafted by the staff -- the people in the science program and

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regulatory branches," said Robert Perciasepe, who headed the EPA air policy office during the Clinton administration. "I think it would be inappropriate" for the agency to borrow heavily from an industry memorandum, he said, "unless it was from a government contractor."

Martha Keating, a toxics scientist with the Clean Air Task Force and a former EPA employee, was the first to discover the similarities between some of the proposed rules and the law firm's memos. "It just illustrates the inside track the industry groups and some of these law firms have with the administration," she said.

Claudia M. O'Brien, lead writer of the Latham & Watkins memos, said it was "gratifying" that the EPA found the firms' analysis persuasive, but that "we didn't ask EPA to cut and paste our analysis into their [rule-making] preamble."

"It was a long rule-making process, and it's a big document done under a tight time frame," she said. "If they found an analysis persuasive, they adopted the analysis."

Until recently, the EPA appeared on track to issue new rules requiring the nation's 1,100 coal- and oil-fired power plants to meet a maximum achievable control technology (MACT) standard to sharply reduce mercury pollutants within three years. That approach met strong resistance from industry groups, which say the regulations would be excessively costly and would be impossible to meet with existing technology.

Instead, the administration has embraced a mandatory "cap-and-trade" program, similar to the program used to combat acid rain, begun in 1990. The new program, intended to reduce mercury emissions by nearly 70 percent by 2018, would allow utilities to buy emissions "credits" from cleaner-operating plants to meet an overall industry target without having to install new scrubbers in every plant.

To comply with a consent agreement, the EPA also proposed a modest MACT standard to reduce mercury emissions by 29 percent by the end of 2007 -- although Holmstead said that is not the administration's preference.

A third proposal would use a more novel legal interpretation of the Clean Air Act to launch a cap-and-trade program. In describing this alternative, the EPA borrowed heavily from one of the Latham & Watkins memos. According to Holmstead, the law firm's language was part of the public record and was passed along to the EPA by the White House budget office and the Energy Department.

The EPA used the other memo to describe at length plans to rank and regulate coal in "subcategories" based on the amount of mercury pollution they emit.

"Neither Bill [Wehrum] nor I had any idea this language came from Latham & Watkins," Holmstead said. "Our technical folks who did subcategorization used it."

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